



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 26, 1998

Mr. Kevin D. Pagan
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR98-1302

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 115345.

The City of McAllen (the "city") received three requests for information concerning a specified accident. You state that you have released the front page information and the accident report. You claim that the remaining information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that among the records requested was an autopsy report. Although you did not submit an autopsy report with the documents you claim are responsive to the request, we note that section 11 of article 49.25 of the Code of Criminal Procedure provides that autopsy reports are public records. *See also* Open Records Decision Nos. 529 (1989), 21 (1974). The Open Records Act's exceptions to required public disclosure do not, as a general rule, apply to information expressly made public by other statutes. *See* Open Records Decision No. 525 (1989).

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989)

at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. In this instance you have made the requisite showing that the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a). The requested records may therefore be withheld.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, we note that front page incident report information may not be withheld from disclosure under section 552.103. See Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information incident report); see also *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) (information normally found on front page of offense report is generally considered public).¹ Finally, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

¹Nor does section 552.108 protect basic information or information which has been publicly released. See generally Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976).

²As we resolve this matter under section 552.103, we need not address your other arguments. We caution, however, that some of the information may be confidential by law. Therefore, if the city receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the city should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

VDP/glg

Ref.: ID# 115345

Enclosures: Submitted documents

cc: Mr. Carlos L. Guerra
Attorney at Law
4201 N. McColl Road
McAllen, Texas 78504
(w/o enclosures)

Mr. Julian Rodriguez, Jr.
Attorney at Law
900 N. Bryan Road, Suite 202
Mission, Texas 78572
(w/o enclosures)

Mr. Sean F. O'Neill
O'Neill & Balega
70 N.E. Loop 410, Suite 490
San Antonio, Texas 78216
(w/o enclosures)